Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 505.

CAPITAL CITY LIGHT AND FUEL COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF TALLAHASSEE, DEFENDANT IN ERROR.

Statement.

The Capital City Light and Fuel Company sought by its bill to enjoin the City of Tallahassee from installing and operating an electric lighting plant for municipal use, and for the use of such of its inhabitants as might require and pay for the same.

The ground upon which the complainant based its application was, that under its charter and an ordinance of said city complainant had the exclusive right and privilege of lighting said city by gas *and electricity*, and that the act of the legislature authorizing the City of Tallahassee to establish and operate such plant and the ordinance under which said city was about to avail itself of the provisions of such act violated the obligation of the contract with complainant.

The complainant company acquired the right, claimed to be *exclusive*, through the Tallahassee Gas and Electric Light Company. That company was incorporated on December 20, 1887, under the general incorporation law. The general nature of the business to be conducted by it, as expressed in its charter, was to construct, maintain, and operate gas works *and electric light works* in the city of Tallahassee; to manufacture gas for light and fuel; to dispose of and deal in coal or wood for fuel; to maintain and operate electric light machinery for supplying light in said city; to manufacture and deal in any and all manner of artificial light or heat within said city.

After its incorporation the Tallahassee Gas and Electric Light Company applied to the City of Tallahassee for the franchise of constructing gas and electric light works in said city for the purposes declared in its charter. The city passed an ordinance January 4, 1888, granting to said company the right to construct gas and electric light works in said city; and, for that purpose, the right to lay its pipes, erect its posts, poles, or towers, and stretch its wires in the streets of said city.

By this ordinance a maximum limit was placed on the price of gas to be furnished, both for public and private lighting, and a minimum candle power of the lights was fixed. The City of Tallahassee also obligated itself to take all gas that it might wish to consume in lighting its streets or buildings from said company, but did not bind itself to take gas. The ordinance also provided that the privileges and licenses therein and thereby granted should be exclusive in and to said company, their associates, successors, and assigns, for and during the term of twenty-five years.

It was further provided by said ordinance that, within thirty days after it went into effect, said company should file its written acceptance thereof in the office of the city clerk, whereupon the same should become binding upon both parties, and that the construction of the gas works

should be commenced within thirty days after filing such acceptance, and completed and in practical operation within six months after the commencement of construction, and that said company should put in and operate electric lights as soon as sufficient consumers could be secured to pay 8 per cent. interest per annum on the additional capital required to purchase the machinery for and to put in practical operation the said electric lights.

The Tallahassee Gas and Electric Light Company constructed its gas works and enjoyed all the rights, privileges, and franchises conferred by its charter and said ordinance until its works were taken possession of by a receiver appointed in a proceeding to foreclose a mortgage given by said company on all its property.

By virtue of a decree of foreclosure and sale rendered in said suit, all the property, real, personal, and mixed, and the corporate franchise of said company were sold and bought in by one W. A. Rawls, who bought for the purpose of making over the property to the Capital City Light and Fuel Company, thereafter to be organized.

The Capital City Light and Fuel Company, plaintiff in error, was organized, after such sale, under the general incorporation law and took over all said property and continued to operate the said gas works, and the City of Tallahassee recognized and dealt with the said Capital City Light and Fuel Company from its organization as the lawful successor of the Tallahassee Gas and Electric Light Company and the legal assignee of all its rights, privileges, and contracts.

This situation continued until the year 1899, when the legislature of Florida passed chapter 4875 of the Laws of Florida, approved May 27, 1899, entitled "An act to enable the City of Tallahassee to exercise the powers provided by chapter 4600 of the Laws of Florida, entitled, 'An act to enable cities and towns to manufacture and distribute gas and electricity, and to construct, purchase, lease and estab-

lish, and maintain within its limits, one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use and for the use of such of its inhabitants as may require and pay for the same, as herein provided,' approved June 5th, 1897, and to declare the manner in which such city may exercise such powers."

(See such parts of these acts as are necessary for a proper consideration of the points involved at the conclusion of the brief.)

The City of Tallahassee took the required steps under the provisions of this act to exercise the authority there granted to construct, purchase, establish, and maintain within the limits of said city a plant for the manufacture of electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same, and to issue its bonds for the purpose of raising the necessary money for constructing such electric lighting plant.

It was at this point that complainant filed its bill for injunction.

The circuit court for Leon county, in which the bill was filed, denied the injunction and dismissed the bill. The complainant appealed from this decree to the supreme court of Florida, and that court having affirmed the judgment of the lower court, this writ of error was sued out.

Assignment of Errors.

The error assigned in the supreme court of Florida was the rendering of the decree of May 15, 1900, by the circuit court of Leon county, wherein and whereby complainant's application for an injunction was denied, defendant's demurrer to complainant's bill sustained, and complainant's bill dismissed.

The error assigned here is that the supreme court of Florida erred in affirming the decree aforesaid of the said circuit court by its final decree of October 10, 1900, there

being drawn into question in said cause the validity of a statute of or authority exercised under the said State of *Florida*, on the ground of their being repugnant to the Constitution of the United States—namely, the validity of a statute of said State approved May 27, 1899, and entitled "An act to enable the City of Tallahassee to exercise the powers provided by chapter 4600 of the Laws of Florida, entitled 'An act to enable cities and towns to manufacture and distribute gas and electricity, and to construct, purchase, lease, and establish and maintain within its limits one or more plants for the manufacture and distribution of gas and electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided,' approved June 5th, 1897, and to declare the manner in which such city may exercise such powers;" and the validity of an ordinance of said City of Tallahassee passed under authority of the said statute and approved September 11, 1899, and entitled "An ordinance providing for the issue of bonds by the City of Tallahassee for the purpose of establishing and maintaining an electric light plant for municipal use and for the use of its inhabitants, and providing for the submission of the question of the ratification of such ordinance to an election of the qualified voters of said city"—which statute and ordinance, it was contended by plaintiff in error, were repugnant to the Constitution of the United States in that they violated the obligation of a contract which conferred on plaintiff in error the exclusive privilege of operating gas and electric works in the said city of Tallahassee, and the decision of said court was in favor of the validity of the said statute and of the said ordinance.

ARGUMENT.

The plaintiff in error contends that the Tallahassee Gas and Electric Light Company, under the law of its incorporation and the ordinance of the City of Tallahassee granting the use of its streets, had exclusive privileges, for the purposes of its creation, for the term of twenty years from the date it commenced to carry out in good faith the terms of its articles of incorporation, and that these exclusive privileges passed under the foreclosure sale, through the medium of Rawls, the purchaser at said sale, to the plaintiff in error, and that the act of May 27, 1899, authorizing the City of Tallahassee to establish an electric plant for public and private lighting, and the action of the city authorities thereunder, violated the obligation of the contract between the plaintiff in error and the City of Tallahassee and the State of Florida.

The constitution of the State of Florida, adopted in the year 1868, contained the following provision:

SEC. 21 OF ART. IV. "The legislature shall establish a uniform system of county, township, and municipal government."

SEC. 22 OF ART. IV. "The legislature shall provide by general law for incorporating such municipal, educational, agricultural, mechanical, mining and other useful companies, or associations, as may be deemed necessary."

The first legislature that convened under this constitution passed "An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in the State" (chapter 1638, Laws of Florida). This act was approved August 6, 1868.

The same legislature also passed "An act to provide for the creation of corporations and to prescribe their general powers and liabilities" (chapter 1639, Laws of Florida). This act was approved August 8, 1868.

It is clear that both these acts were passed in obedience to the constitutional mandate quoted above, and that each was passed with reference to the other.

Section 12 of chapter 1638 confers upon cities to be incorporated thereunder the power to regulate, improve, alter, extend, and open streets, lanes, and avenues.

Section 15 of chapter 1638 confers the power to provide for the lighting of the streets of the city or town.

Section 1 of chapter 1639 provides that any number of persons may associate themselves and become incorporated for the transaction of any lawful business of a *public* or private character, including all *works of internal improvement.*

Section 2 of this act confers the usual corporate powers.

Section 10 confers upon any corporation organized under this act the power to enter upon any land or lands, public or private, necessary to the business contemplated in its articles of association.

Section 37 provides that nothing contained in this statute should be construed to extend to any *county* or *township.*

Mark the omission here of *municipal corporation* as grouped with *county* and *township* in section 21, article IV, of the constitution of 1868.

Section 38 provides that any corporation organized and put into successful operation under this act shall have *exclusive privileges for the purposes of its creation* for the term of twenty years from the date the corporation commences to carry out in good faith the terms of the articles of incorporation, provided that this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit, the power to create revenue for public purposes, to provide for the common defense, to provide for safe and convenient ways for the public necessity and convenience, and to take private property for public use, and the like.

McClellan's Digest, sec. 30, p. 234.

The language of section 15 of chapter 1638 with reference to the lighting of the streets of cities is very general in its terms. It is: "Shall have power * * * to *provide for* the lighting of the streets."

It is clear from the language of section 1 of chapter 1639 that corporations could be created thereunder for either *public* or private purposes. It could have been intended, however, to confer the power of eminent domain and the exclusive privilege franchise only on corporations created for a *public* purpose. It would not be contended, for instance, that a corporation created for the purpose of conducting a grocery business in the city of Tallahassee would either have the right to condemn a building to be used for its business or have a monopoly of the grocery trade in the city. But these provisions must be given some meaning, and they can only be extended to such subjects as they had previously been known to relate to. The commissioners appointed to revise the statutes of Florida omitted from the revision (adopted as an entirety by the legislature of 1891) the provision for exclusive privileges, and limited by express language the exercise of the right of eminent domain to coporations organized for the purpose of constructing, maintaining, or operating *public works.*

Rev. Statutes of Fla., sec. 2158.

The Tallahassee Gas and Electric Light Company was incorporated under the laws, to which reference has been made, for the purpose of constructing, maintaining, and operating gas works and electric light works in the city of Tallahassee and for manufacturing and dealing in any and all manner of artificial light within said city.

See Exhibit A, Record, p. 10.

This was a public work, and the company acquired the right of eminent domain and exclusive privileges for the purpose of its creation for the term of 20 years from the date

the corporation commenced to carry out in good faith the terms of its articles of incorporation.

The Tallahassee Gas and Electric Light Company could only have such powers and franchises as were conferred upon it by its own charter or by the city of Tallahassee under a proper exercise of its powers.

At the time of the incorporation of the Tallahassee Gas and Electric Light Company the city council of the city of Tallahassee had the power *to provide* for the *lighting of the streets* of the city and to do and perform all such other acts as should seem necessary and best adapted to the improvement and general interest of the city.

McClellan's Digest, p. 249, sec. 21.

The power to light the streets carried with it the choice of means to accomplish that end.

Jacksonville Electric Light Co. *vs.* City of Jacksonville, 36 Fla., 271.

The city council also had the power to regulate, improve, alter, extend, and open streets, lanes, and avenues, and to regulate and control the grading, construction, and repairs of all streets, pavements, and sidewalks.

McClellan's Digest, p. 248, secs. 17 and 19.

The law of incorporation of the Tallahassee Gas and Electric Light Company must be construed in connection with the law of incorporation of the city of Tallahassee.

State of Fla. *ex Rel. vs.* Jacksonville St. R'y Co., 29 Fla., 590.

"The authority of a general nature to regulate and control the streets, usually granted to municipal bodies, is generally deemed sufficient to clothe the municipal body with the right to grant, or refuse, or otherwise to regulate, the uses of the streets for street railways operated by horse power."

Ibid.

"A difference exists between the power of a municipal corporation to grant a corporate franchise, and the right to permit a corporation vested with such a franchise to place railroad tracks in the public streets. If the municipal body can ever grant a corporate franchise, such power must be expressly conferred by the legislature."
Ibid.

The same may be said of the use of the streets for gas and water pipes and electric poles and wires.

We quite understand that "the powers conferred upon cities and towns by the general act (section 17, page 248, McClellan's Digest) do not confer upon municipal corporations established thereunder the right to vest, by contract, in a street railway company an *exclusive* right to construct tracks on all streets of the city as laid out."

F. C. & P. R. R. Co. *vs.* Ocala St. & Sub. R. R. Co., 39 Fla., 306.

But, as we have seen, the city of Tallahassee had the express power to provide for *lighting its streets* and to do all such other acts as might be best adapted to the improvement and general interest of the city.

McClellan's Digest, p. 249, sec. 21.

The furnishing of gas and electricity for *domestic consumption* was adapted to the improvement and general interest of the city.

The city having the full control and management of its streets, the Tallahassee Gas and Electric Light Company, though incorporated for the express purpose of lighting the city of Tallahassee, could not use the streets of said city for the purpose of laying its pipes and erecting posts and wires without the consent of the city. Therefore this company, after its incorporation, applied to the city of Tallahassee for authority to construct gas and electric light works in said city, and for that purpose to lay pipes and erect such lamp

posts or poles or towers and run wires thereto in and along the streets of said city as might be necessary or essential for furnishing gas or electric lights in said city of Tallahassee.

On January 4, 1888, an ordinance was passed by the council of the city of Tallahassee, pursuant to this application, authorizing the Tallahassee Gas and Electric Light Company to construct gas and electric light works in said city, and for that purpose the right to lay its pipes in any and all streets, alleys, and lots thereof and to erect such lamp posts or poles or towers as might be necessary for furnishing gas and electric lights in said city, and, to that end, to make such excavations or erect such structures, poles, or towers, and run wires thereto along the streets of said city, as might be necessary or essential.

See Exhibit B, Record, p. 11.

Sections 2, 3, 4, and 5 of the ordinance prescribe regulations to control the company in its use of the streets while putting in its plant.

Section 6 of the ordinance provides for the minimum candle-power of the gas to be furnished for illuminating purposes and a maximum price to be paid by private consumers per thousand feet and by the city per lamp.

Section 7 provides that the company must file its written acceptance of the terms of the ordinance with the city clerk within thirty days after it takes effect; whereupon the same shall become binding on both parties; and it also provides the time when the construction of the *gas works* must be commenced and completed, and that the company shall put in and operate *electric light works* as soon as sufficient consumers can be secured to pay 8 per cent. interest per annum on the additional capital required to purchase the machinery and to put in practical operation the said electric lights.

Section 8 provides that if the company shall fail to furnish gas at any time for the space of six months or shall

violate any provision of the ordinance, the council may repeal the same.

By section 10 of the ordinance the city binds itself to take from the company all the gas that it may wish to use in lighting its streets or buildings for the period of twenty-five years, but with the proviso that it does not obligate itself to take any gas.

Section 11 provides that the privileges and licenses granted shall be exclusive in and to said company, their associates, successors, and assigns, for and during the term of twenty-five years.

All the corporate franchises of the Tallahassee Gas and Electric Light Company were acquired by it from the provisions of the act under which it was incorporated, as it existed at the time the company accepted and complied with the terms of the said act in effecting its organization.

Under the terms of that act the company had exclusive privileges for the purpose of its creation for the period of twenty years.

When the city passed the ordinance of January 4, 1888, it was with knowledge that the company upon being put into successful operation under its charter would have such exclusive privileges for the term of twenty years from the date the company commenced to carry out in good faith the terms of its articles of incorporation.

In the case of State *ex rel. vs.* Jacksonville St. R'y Co., 29th Fla., 590, the supreme court of Florida holds that the street railway, which was incorporated under the general act for the incorporation of railroads and canals, obtained its *franchises* by virtue of its incorporation, but that the city of Jacksonville having control of its streets, under the act of its incorporation, the railroad company could not occupy the streets without the consent of the city, and that the city in giving its consent might impose conditions and burdens on the company not imposed by the law of its organization.

In other words, that court has construed the two acts (the general act for the incorporation of railroads and the general act for the incorporation of cities) together; and the railroad company, having been admitted to the streets of Jacksonville, had all the rights and powers conferred by its charter, except where restrained or conditioned by the ordinance admitting it to the use of the streets.

The City of Tallahassee in its ordinance granting the use of its streets to the Tallahassee Gas and Electric Light Company, while imposing some requirements as to brilliancy and price of lights and manner of using streets during construction, went even further than the act of incorporation as to the term of the exclusive privilege, making it twenty-five years—the period of the full life of the corporation—instead of twenty years, as provided in the general incorporation law.

The legislature, where not restrained by constitutional limitation, can grant the exclusive right to a corporation or individual to furnish light or water to a city.

State *vs.* Milwaukee Gas Light Co., 29th Wis., 454.
New Orleans Gas Co. *vs.* La. Light Co., 115 U. S., 671.
New Orleans Water Co. *vs.* Rivers, 115 U. S., 680.
Louisville Gas Co. *vs.* Citizens' Gas Co., 115 U. S., 683.
Crescent City Gas Light Co. *vs.* New Orleans Gas Light Co., 27th La. Ann., 138.

It makes no difference whether the franchise is granted by special act or acquired under a general law, so it proceeds from the legislative authority of the State.

There is no limitation upon the legislature in this respect in the constitution of Florida.

Such franchise, when granted and accepted and acted

upon, becomes a contract which cannot be impaired by subsequent legislation.

New Orleans Gas Co. *vs.* Louisville Light Co., 115 U. S., 671.

City of Quincy *vs.* Bull, 106 Ill., 351.

State *ex rel. vs.* Columbus Gas Light & Coke Co., 32 Am. Rep., 390.

Walla Walla City *vs.* Walla Walla Water Company, 172 U. S., 1.

This fact does not restrict the State or city to legislate to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contract.

See cases last cited.

The proviso of section 30, page 234, McClellan's Digest of the Laws of Florida, recognizes this principle and expressly provides that this investment (with exclusive privileges) shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit, the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like.

Also, by chapter 4052, Acts of 1891, the legislature of Florida has recognized this principle and expressly gives cities police power over such corporations, and provides a means of forfeiting their charters in case any reasonable regulation or requirement of this character is not complied with.

Section one of this act provides that—

"whenever any street railroad, gas, electric lighting, telephone, telegraph, or other company or corporation, person or firm, which has received or shall receive from any mu-

nicipal corporation in this State any franchise, grant, right, privilege, license, or immunity to use, or under which such company, corporation, person or firm, shall use, any of the streets or parts thereof, within such municipal corporation, for the placing or maintaining in such streets of any tracks, pipes, wires, poles, or other things necessary to the carrying on of the business of such company, corporation, person or firm, shall violate any of the terms, conditions or provisions of such grant, privilege, right, license or immunity, or shall fail to comply with any reasonable provision of any ordinance of such municipal corporation regulating the use by such company, corporation, person or firm, and shall continue to violate the terms, conditions, or provisions under which such franchise, grant, privilege, right, license or immunity was given, or to violate the reasonable provisions of such ordinance, regulating the use by such company, corporation, person or firm, of such streets, for a period of five days after said company or corporation shall have been notified in writing by the mayor, or chairman of the board of public works, or president of the city council, of such municipal corporation, to desist from such violation, then such company, corporation, person or firm, shall be deemed to have forfeited and annulled, and shall thereby forfeit and annul, all of the said franchises, grants, privileges, rights, licenses and immunities, and such forfeiture shall be so declared by the judge of the circuit court for the county in which such municipal corporation shall be located, upon the affirmative finding of the jury trying the case as prescribed in the following sections."

But where the contract is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.

Walla Walla City *vs.* Walla Walla Water Company,
172 U. S., page 1.

It is true that the City of Tallahassee did not obligate itself to take any gas from the company for lighting its streets or public buildings, but it did thereby contract, if it used gas at all, to take it from said company. The power in

a municipal corporation to light its streets does not make it the duty of the city to do so.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

It may even lease its own gas works to a private party or corporation under contract to light the city.

Ibid.

And a provision of an ordinance leasing city gas works that the city will not in any way interfere with, limit, restrict, or imperil the exclusive right thereby vested in the gas company does not create a monopoly against public policy where the franchise of the lessee is derived from the legislature and not from the city, and it merely makes the privileges exclusive so far as the city is concerned.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

Walla Walla City *vs.* Walla Walla Water Company, 172 U. S., 17.

The inability of a common council to bind the discretion of its successors for a term of years in respect to a municipal or governmental function does not extend to a lease of city gas works, in respect to which the city acts in a business capacity solely.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

Ill. Trust & Savings Bank *vs.* Ark. City, 34 L. R. A., 518.

The ordinance of January 4, 1888, by its seventh section, provided that when accepted by the company it should become binding upon both parties. The company, though incorporated solely with a view of operating in the city of Tallahassee and possessed of all the necessary franchises to do so, when the right to occupy the streets should be conceded by the city, was under no contractual obligation to the city to enter upon its proposed business until it had accepted the terms of the ordinance. While the city could

not confer any franchise on the company, still it had the power, under the authority of the decisions above cited, to enter into a contract with a company having all the necessary franchises to light the city that the municipal corporation itself would not become a competitor in such business. We contend that the provision of section 11 of the ordinance, that the privileges and licenses thereby conferred should be exclusive to the company, their associates, successors, and assigns, for twenty-five years, while not conferring on the company an exclusive *franchise* to the use of the streets, was at least a contract on the part of the city that the municipality itself would not become a competitor with the company in such business during that period, the said company having been incorporated with a view solely of operating in the city of Tallahassee, and, under the law of its organization, the privileges conferred being exclusive when the company accepted the terms and conditions of the ordinance.

Bailey *vs.* City of Philadelphia, 39 L. R. A., 637.

Walla Walla City *vs.* Walla Walla Water Company, 172 U. S., page 1.

Atlantic City Water Works *vs.* Atlantic City, 39 N. J. Eq., 367.

Southwest Missouri Light Co. *vs.* City of Joplin, 101 Fed. Rep., 23.

In the Walla Walla case this court say:

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons for a term not exceeding twenty-five years. In establishing a system of water works the company will necessarily incur a large expense in the constructing of the power-house and in laying the pipes through the streets, and as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible,

and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would not have entered upon this large undertaking in view of the possibility that in one of the sudden changes of public opinion to which all municipalities are more or less subject the city might resolve to enter the field itself, a field in which it undoubtedly would have become the master, and practically extinguished the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

But if, in view of the fact that the city made no positive contract with the company to light its streets with gas and no contract at all to take electricity for lighting purposes, the franchise of the company is not exclusive, so far as the lighting of the streets is concerned, yet the city, at the time of the incorporation of the company and the passage of the ordinance, had no power to enter into the business of domestic lighting for compensation, and such privilege having been acquired by the company, and being exclusive under its charter, it cannot be violated or impaired by subsequent legislation authorizing the city to become a competitor in such business. This is attempted to be done under chapter 4875, Laws of Florida, Acts of 1899, page 306.

But it is contended on behalf of the city that the city, in undertaking to furnish electric lighting, does not violate any right of the company, as its lighting plant is a gas plant.

Had the franchise granted to the company by its charter been to light with gas solely, the contention would be good, for we are aware that the grant of an exclusive privilege of lighting with gas does not preclude the subsequent granting to another of the right to light by electricity, nor does a

grant to one of the exclusive right to supply a city with water from a particular stream preclude a subsequent grant to another of the right to supply the city from a different stream.

Saginaw Gas Light Co. *vs.* City of Saginaw, 28th Fed., 529.

Stein *vs.* Bienville Water Supply Co., 141 U. S., 67.

But in the case at bar the right acquired by the Tallahassee Gas and Electric Light Company under its charter was to light with both gas and electricity and "all manner of artificial light," but by agreement with the city, under the terms of the ordinance, the council, presumably with a full knowledge of the population of the city and of the conditions existing there, only required the company to put in and operate electric lights when sufficient consumers could be secured to pay 8 per cent. interest per annum on the additional capital required to purchase the machinery for and to put in practical operation the said electric lights.

It is true that the council had no power to add to or subtract from the *franchises* granted by the State, except, as in the case of occupying the streets, something was required under the law, as it existed at the time of acquiring the charter, to put the franchises into operation. But it was within the power of the council of the city to provide, in view of the fact, which must have been known to them, that the operation of both systems could not at the time pay a fair return on the capital invested, that the company would not be required to operate the electric plant until it could realize at least 8 per cent. interest (the legal rate) on the capital invested. The case of Gonzalez *vs.* Sullivan, 16 Fla., 791, we do not think conflicts with this proposition. The facts of the two cases differ.

And this is not inconsistent with the evident purpose of the company to procure a charter that would cover both gas and electricity, as well as the whole field of artificial light-

ing, so as to prevent interference from competition by *any* method of lighting.

It appears from the allegations of the bill that there has never been a time when 8 per cent. on the capital that would be required to put into operation an electric lighting system in said city could be earned.

Up to this point we have considered only the question as to what were the rights and franchises of the Tallahassee Gas and Electric Light Company. The next question to be considered is, Did the franchises of this company to operate gas and electric light works in the city of Tallahassee and the exclusive right to this privilege pass under the foreclosure sale to Rawls, and from him to The Capital City Light and Fuel Company, plaintiff in error, under his deed of transfer or assignment.

The Tallahassee Gas and Electric Light Company had the power, under the law of its creation, to hold, buy, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation should require, not exceeding the amount limited in its articles of incorporation.

McClellan's Digest, page 228, sec. 3.

The right to lay and keep its pipes in the streets and to use the streets for the purposes of its business is a franchise, and one that is essential to the use of its property. This franchise necessarily passes with a sale of the property. But does it retain its exclusive character?

"The franchise of being a corporation is not assignable. Neither the franchise involving the performance of public duties, nor the property necessary to the exercise of such franchise, is assignable, without the consent of the State. Subject to the exception just named the secondary franchises of a corporation, that is those peculiar and exclusive privileges which do not consist in the right of being a corporation, are property, and hence assignable."

Thompson on Corporations, sec. 5352.

"If the property of a corporation is of such a character as to be adapted only to a particular use, a grant of authority to the corporation to transfer or mortgage the property would by implication include a grant of authority to confer upon the transferee, or purchaser under the mortgage, the right and power of applying the property to the particular use for which it is adapted. Otherwise the grant of the authority to transfer or mortgage the property would be nugatory. A sale or mortgage of the property would destroy its usefulness, and confer nothing of value on the purchaser or mortgagee.

"This principle of construction has special application to a grant to a railroad company of authority to sell, lease or mortgage, its railroad. The property of a railroad company is practically worthless, except for use and operation as an entire railroad. Railroad companies do not ordinarily own the road-bed, but have a mere right of way, or easement, for railroad purposes; and, even if they own their road-beds in fee, it is evident that the land and the rails, ties, and other structures, would be of no substantial value without the right of using them as a railroad.

"It is immaterial whether the right of using and operating the railroad be regarded as a statutory right called a franchise, or as a license conferred by a municipality, or as a mere easement or property right existing under the common law, a transfer of the property pursuant to authority conferred by law would include a transfer of every right necessary for its continued operation."

Morawetz on Corporations, sec. 932.

Detroit *vs.* Natural Gas Light Co., 43 Mich., 594.

A statutory power conferred upon a railroad company to execute a mortgage upon the road and its property carries with it, by necessary implication, the power to include in the mortgage its franchise of building the railroad.

Barnstown R. R. Co. *vs.* Metcalfe, 4th Metc. (Ky.), 199.

Coe *vs.* Columbus, etc., R. R. Co., 10 Ohio St., 372; S. C., 75th Am. Dec., 518.

Trask *vs.* McGuire, 18th Wallace, 391.

Cal. St. Tel. Co. *vs.* Alta Tel. Co., 22d Cal., 398.

Atkinson *vs.* Marietta, etc., R. R. Co., 15th Ohio St., 21.

If the privilege of operating gas and electric light works in the city of Tallahassee and using the streets of the city for that purpose was exclusive, such exclusiveness was a valuable feature of the franchise. The foreclosure and sale did not carry with it the franchise of being a corporation, which had been conferred on the Tallahassee Gas and Electric Light Company, or the power to sue and be sued, to use a corporate seal, etc., but it did carry all its property and the right to use it for the purposes for which it was designed and adapted.

The franchise *exclusiveness* could not remain in the Tallahassee Gas and Electric Light Company after the sale, because, had it done so, it would have precluded the purchaser from making use of the property as an entirety, for the exclusive right remaining in the Tallahassee Gas and Electric Light Company would have been violated the moment Rawls or the Capital City Light and Fuel Company began to use the gas works for the purpose for which they were constructed. The mortgage and the foreclosure sale thereunder did not destroy any franchise, for such as did not pass by the sale remained with the mortgagor company, and if that be true and the view that the franchise of exclusiveness remained in the original company is inconsistent with the use of the mortgaged property by the purchaser, then such franchise must have passed with the property.

An exclusive franchise may pass by sale.

Cal. St. Tel. Co. *vs.* Alta Tel. Co., 22 Cal., 298.
Thompson on Corporations, sec. 5369.
Detroit *vs.* Mutual Gas Co., 43 Mich., 594.
Willamette *vs.* Bank, 119 U. S., 191.

If this exclusive privilege passed with the property and the right to use it, there was nothing in the fact that the purchaser was an individual inconsistent with the enjoyment of the privilege.

If an individual could enjoy it, then a corporation clothed

with the power of using the property could acquire it, it having been legally created and being the subject of mortgage and sale, although such exclusive privilege was not one of the franchises conferred on the second corporation by the act of its creation, as that feature of the general incorporation act was omitted from the Revised Statutes in 1891, and the Capital City Light and Fuel Company was incorporated in 1894.

The exclusive right was created with the original corporation. That company had the power to and did mortgage its property. This exclusive privilege was a valuable incident to the use of the property mortgaged, and the retention of it by the original company was inconsistent with the mortgage and the sale under it and the use of the property by the purchaser. While the second company had no exclusive franchise under its own charter, there was nothing which prevented it, under its general power of *acquiring*, maintaining, and operating gas works and electric light works in the city of Tallahassee, from acquiring by purchase such a right already existing and incident to the property which it acquired under the terms and for the purposes of its charter.

An exclusive privilege conferred is unlike an immunity from taxation granted.

The case of Morgan *vs.* Louisiana, 93 U. S., 217, draws a distinction between franchise and immunity. One is in character positive, the other negative.

Franchises are rights or privileges which are essential to the operation of the corporation and without which its works would be of little value.

Immunity is the right to escape a burden which otherwise would have to be borne in common with others. Exemption from taxation is an immunity. It is personal to the company to which it is granted, and cannot be transferred without express legislative authority.

The plaintiff in error (Capital City Light and Fuel Com-

pany) was incorporated March 19, 1894, with the purpose and intent of acquiring and operating, under the terms and provisions of the ordinance of the city of Tallahassee of January 4, 1888, the property purchased by Rawls under the decree of foreclosure; and the property was purchased by Rawls with the intent and purpose of transferring it to the said company for such purposes; and, in pursuance of such intent and purpose, the said property was made over by him to the Capital City Light and Fuel Company, and the said company at once entered into the possession and assumed the management and control thereof, and continued the manufacture of gas for the purpose of supplying said city and its inhabitants with light and heat, and has, since coming into possession thereof, enlarged and extended its plant to meet the increased demands of said city and its inhabitants; and the said city has ever since recognized, treated, and dealt with the said Capital City Light and Fuel Company as the lawful successor to the said Tallahassee Gas and Electric Light Company and as the legal assignee of all the rights, franchises, privileges, and contracts created and conferred on the said last-named company by the ordinance of January 4, 1888.

See bill, Record, pages 3 and 4.

Such was the situation when the legislature passed the act of May 27, 1899, chapter 4875, Laws of Florida, and it is this act and the resolution and ordinance passed by the council putting it into effect that plaintiff in error claims to be a violation of the obligation of its contract for lighting said city with gas and electricity, and for manufacturing and dealing in any and all manner of artificial light within said city.

The supreme court of Florida, in sustaining the judgment of the circuit court, holds that so far as any exclusive privilege for the use of the streets claimed under the ordi-

nance by the appellant (plaintiff in error) or its alleged predecessor is concerned, it is sufficient to say that no such exclusive right could be granted by the city because of the want of power to grant it, and that that portion of the ordinance attempting to grant such exclusive use, either as to gas or electricity, is therefore void; and, further, they say that whatever rights and privileges of an exclusive nature the Tallahassee Gas and Electric Light Company possessed must be derived from the general incorporation act under which it was incorporated, and this brings them to the further contention of appellant that that company, by the act of its incorporation, had an exclusive right to use the streets of the city so far as the business of manufacturing and distributing gas and electricity for the use of the city and its inhabitants is concerned.

The contention of the plaintiff in error, as attempted to be made before the supreme court of Florida, is not here exactly stated. The exclusive privilege which the plaintiff in error claims is to construct, maintain, and operate gas works and electric light works in the city of Tallahassee; to manufacture gas for light and fuel; to maintain and operate an electric light machine for supplying lights in said city, and to manufacture and deal in any and all manner of artificial light or heat within said city. The company, though incorporated for such purposes, could not occupy the streets over which the city had been given control without the consent of the city, but this consent having been obtained and the purposes of the corporation entered upon, the use of the streets for such purposes became exclusive only incidentally from the fact that no one else could compete with the company in the objects of its creation; and plaintiff in error further contends that the city, charged with notice of the powers of the company under its charter, and having admitted it to the use of its streets for its declared purposes, by the eleventh section of the ordinance in effect contracted that the city at least would not become a competitor in such business.

But the supreme court of Florida holds that, in the view they take of the case, it is not essential to decide whether section 30, McClellan's Digest, page 234, confers exclusive privileges or not, or, if it does, to determine whether such privileges passed from one company to the other by the transfers which took place under the mortgage. They base their decision on the fact that the electric light system has never been put into operation by either company, and hence that the company was never put into successful operation, as contemplated by the act of incorporation (sec. 30, page 234, McClellan's Digest), as *to that feature* of its charter.

The language of this section is:

"Any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation."

Was the Tallahassee Gas and Electric Light Company put into successful operation? And did it begin to carry out in good faith the terms of the articles of its incorporation?

This resolves itself largely into a question of fact. Looking to the bill, we find that the city of Tallahassee has a population of about four thousand, a large proportion of which is of a class that is financially unable to use either gas or electricity for domestic lighting; that the company, after organization, applied to the city for the franchise of constructing gas and electric light works in said city for the purposes declared in its charter, and the city by its own ordinance provided that the company should not be required to put in and operate electric lights until a return of 8 per cent. on the additional capital required for that purpose could be secured.

It was evident that the business would not at the time warrant both methods of lighting, and yet the company was not prepared to enter a doubtful field without availing itself

of the protection given by the statute from possible competition from the different instrumentalities used in lighting by covering them in the statement of the objects of its incorporation.

That it was put into successful operation is shown by the fact that the city has continued from the installation of the plant to the time of the filing of the bill to light its streets and public buildings with the gas furnished by the original company and its successor, and the said companies have furnished during all this period gas for domestic lighting, and the works of the company have been enlarged and extended to meet the increased demands, and there has never been a time when a return of 8 per cent. upon the additional capital required to put in an electric light plant could have been yielded.

It seems to us that in the face of these facts it is a mere assumption of a legal conclusion on the part of the supreme court of Florida that the original corporation was not put into successful operation and had not commenced to carry out in good faith the terms of the articles of its incorporation within the meaning of the act, because, forsooth, it had not availed itself of every instrumentality it was empowered to adopt to accomplish the purpose of lighting the city, when the adoption of all, under the conditions existing, would have led to bankruptcy and the consequent defeat of the very object for which the company was created and which the city desired to secure.

The supreme court of Florida argues further that, the electric lighting plant never having been put in by the company, no right to such means of illumination has vested, and hence the legislature had the right to confer that privilege upon the city without violating the obligation of any contract.

And they say that the exclusive privileges as to an electric light plant *could not have operated as a consideration for erecting the gas plant*, for such privileges under the statute

were to attach to the electric light business only when that plant was put in.

We have above respectfully differed with the court in their interpretation of this statute; and we maintain that the exclusive privilege of using the then known instrumentalities of artificial lighting by which the streets of the city and the business places and houses of its inhabitants were to be lighted from a common generating center, and the exclusion of competition by either means, must have been an inducement for putting in a plant for immediate lighting by either of these instrumentalities. If the grant had been only of the right to use the one, then the right to use the other could have been acquired by a different company or could have been exercised by the city itself.

Stein *vs.* Bienville Water Supply Co., 141 U. S., 67.
Saginaw Gas Light Co. *vs.* City of Saginaw, 28 Fed. Rep., 529.

But the fact that the company fails to avail itself of all the instrumentalities covered by its charter to accomplish the purpose had in view in its creation does not have the effect of relieving the legislature from the constitutional inhibition against the violation of the obligation of contract and permitting it to grant to another corporation or individual the right to use such neglected instrumentality.

St. Tammany Water Works Co. *vs.* New Orleans Water Works Co., 120 U. S., 64.

The supreme court of Florida further says that "even if an exclusive privilege of this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our statute, such grant does not become a contract or a vested right so as to be protected by the constitution of the State or of the United States until the company has—to say the least—begun to do the thing required by the charter as the consideration for the grant of such

privilege." And they cite as authority to this proposition Pearsall *vs.* Great Northern Railway Co., 161 U. S., 646; Louisville & Nashville R. R. Co. *vs.* Ky., 161 U. S., 677, and Chincleclamouche Lumber and Boom Co. *vs.* Commonwealth, 100 Pa St., 438.

Broadly speaking, this seems to be a correct statement of the law, and the cases cited sustain it. In the Pennsylvania case nothing whatever had been done by the company to carry out the object of its incorporation. In the Pearsall case the right was expressly reserved to alter the charter in any manner not destroying or impairing vested rights. In the Kentucky case it was held that neither of the corporations proposing to consolidate had the power to do so under their charters; but, conceding such power, the provision of the constitution of Kentucky prohibiting the consolidation of parallel and competing lines was a legitimate exercise of the police power of the State.

If the right to establish and operate an electric lighting plant in the city of Tallahassee had been the only power conferred on the plaintiff in error, or the only purpose of its creation, and the company had failed to exercise the right, there is no doubt but that the franchise could have been revoked. Or if the company had been vested with the franchise of establishing and operating an electric lighting plant and constructing and operating a street railway, and had failed to put the latter utility into operation, the legislature would possibly have retained the power to revoke the latter franchise, although the incorporators may have had in view, when securing the charter, the operation of the lighting system and the propulsion of the street cars by the same power. But the two purposes being separate and distinct, they are not interdependent.

In the Pearsall case this court say:

"Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of its corporate charter, such rights, so far as they are necessary to the

full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation."

And again, quoting from Mr. Justice McLean:

"Every valuable privilege given by the charter, and which conduces to an acceptance of it, and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter."

And again:

"But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object to the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public."

And again:

"We do not deem it necessary to express an opinion in this case whether the legislature could wholly revoke the power it had given to this company to extend its system by the construction or purchase of branch lines or feeders since the possibility of an extension of the road, even to the Pacific coast, may have had an influence upon persons contemplating the purchase of its stock or securities, so that a right to do this might be said to have become vested."

Our contention in the case at bar is that the primary object of the incorporation of the Tallahassee Gas and Electric Light Company was to furnish light to the city of Tallahassee and its inhabitants; that the company in the statement of the objects of its incorporation, in its articles, covered both instrumentalities—gas and electricity; that under the law of its incorporation these rights were to be exclusive; that the conditions of population were

such that both systems could not at the time be profitably operated; that the city elected by its ordinance *which system should be put into immediate* operation, and provided that the other should only be required when a reasonable profit could be earned on the capital to be invested; that a competitive system would be destructive of the company's business and property, and, looking forward to the possibility of such competition, both systems were embraced—not for speculative purposes, as intimated in the opinion of the supreme court of Florida might be the case, but as a means of making it a going enterprise and accomplishing the purpose of its creation. There is nothing in the record to show that its work has not been well done, or that any condition has arisen calling for or justifying an exercise of the police power. The two franchises for accomplishing the same end by different instrumentalities are so correlated and interdependent, so interwoven and concomitant, that revoking the one would prove the means of destroying the other. The consideration for accepting the charter was the right to light by both methods, and is entire and indivisible. The court has no means of determining to what extent the right to light by electricity influenced the company to put in its gas plant. Without such franchise, it is more than probable that the company would not have accepted its charter and installed and operated its gas plant. The court can more reasonably infer that the right to light by electricity moved the company to accept its charter, and to act, to the extent that it did thereunder, than that such right did not operate as a consideration for such action on the part of the company. The right to light by electricity continues during the corporate life of the company, and it may be put into execution at any time, but it exists as an exclusive right only "for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation," which, in

our opinion, was the date the gas works were "completed and in practical operation."

Ordinance, sec. 7; Record, p. 12.

For these reasons we think and contend that the statute, which confers upon the city of Tallahassee the right to inaugurate a system of electric lighting for municipal use and for the use of such of its inhabitants as may require and pay for the same, is in violation of the provision of article I, section 10, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

FRED. T. MYERS,
Counsel for Plaintiff in Error.

PARTS OF STATUTES MATERIAL TO DISCUSSION

CHAPTER 4875, LAWS OF FLORIDA.

SECTION 1. That the city of Tallahassee, in this State, may under the limitations provided in said chapter 4600 of the Laws of Florida, approved June 5, 1897, above stated, exercise the powers provided for in said act in the manner set forth in said act; except that where the provisions hereinafter set forth are inconsistent with those provided in said act, then the provisions of this act shall control.

(Section 2 of this act and such part of section 3 as bears upon the case will be found set forth in the bill, pages 4 and 5, printed Record.)

CHAPTER 4600, LAWS OF FLORIDA.

SECTION 1. Any city or town may, under the limitations of this act, construct, purchase, lease or establish and maintain within its limits one or more plants for the manufacture or distribution of gas or electricity for furnishing light for municipal use, and for the use of such of its inhabitants as may require and pay for the same as herein provided. Such plants may include suitable lands, structures, easements, water privileges, stations, gasometers, boilers and engines, dynamos, tools, machinery, pipes, conduits, hose, conductors, burners, lamps and other apparatus and appliances for making, generating, distributing and using gas or electricity for lighting purposes.

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SEC. 6. Any city or town having obtained a plant for the purpose as provided in this act, may manufacture, generate and distribute gas and electricity for furnishing light for municipal use, or for the use of its inhabitants, under such regulations as it may establish. No city or town shall be compelled to furnish gas or electricity to any person or corporation except upon the order of the gas and electric light

committee of such city or town. Any person or corporation aggrieved by the refusal of any city or town supplying gas or electricity under the authority of this act to furnish the same may appeal to such committee, setting forth in such appeal what is required of the city or town in such detail as the committee may require.

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SEC. 9. When any city or town shall decide, as hereinbefore provided, to establish a plant, and any person, firm or corporation shall at the time of the vote required for such decision be engaged in the business of making, generating or distributing gas or electricity for sale for lighting purposes in such city or town, such city or town shall, if such person, firm or corporation shall elect to sell, and shall comply with the provisions of this act, purchase of such person, firm or corporation before establishing a public plant such portion of his, their or its gas or electric plant and property suitable and used for such business in connection therewith as lies within the limits of such city or town. If in such city or town a single corporation owns or operates both a gas plant and an electric plant, such purchase shall include both of such plants, but otherwise such city or town shall only be obliged to purchase the existing gas plant or plants, if it has voted only to establish a gas plant, and shall only be obliged to purchase the existing electric plant or plants if it has only voted to establish an electric plant. If the main gas works, in the case of a gas plant, or the central lighting station, in the case of an electric light plant, lie within the limits of the city or town which has voted to establish a plant as aforesaid, such city or town shall purchase as herein provided the whole of such plant and property used in connection therewith, lying within its limits, and the price to be paid therefor shall be its fair market value for the purposes of its use, no portion of such plant to be estimated, however, at less than its fair market value for any other purpose, including as an element of value the earning capacity of such plant based upon the actual earnings being derived from such use at the time of the final vote of such city or town to establish a plant, and also any locations or similar rights acquired from private persons in connection therewith, plus the damages suffered by the severance of any portion of such plant lying outside of the limits of such city or town, and

minus the amount of any mortgage or other incumbrance or lien to which the plant so purchased, or any part thereof, may be subject at the time of transfer of title; but such city or town may require that such plant and property be transferred to it free and clear of any mortgage or lien, unless the gas or electric committee of such city or town shall otherwise determine. Such value shall be estimated without enhancement on account of future earning capacity, or good will, or of exclusive privileges derived from rights in the public streets. When any capital has been paid in, in property instead of cash, the valuation placed upon such property in estimating it as paid-in capital shall not be conclusive in estimating its value under the foregoing provisions, but may be disputed by the city or town, and if shown to have been excessive, may be reduced by the authority fixing the price of the plant and the property as hereinafter provided.

If the main gas works or central lighting station of such a plant do not lie within the limits of the city or town which has voted as aforesaid, then such city or town shall only purchase that portion of such plant and property which lies within its limits paying therefor upon the basis of value above established, but without allowance of damages on account of severance of plant. No city or town shall be obligated by this section to buy any apparatus or appliances covered by letters patent of the United States or embodying a patentable invention unless a complete right to use the same and all other apparatus or appliances necessary for such use within the limits of such city or town to such extent as such city or town shall reasonably require such right, shall be assigned or granted to such city or town at a cost as low as the cost of such right would be to the person firm or corporation whose plant is purchased.

SECTION 10. Any person, firm, or corporation, desiring to enforce the obligation of any city or town under section 9 to purchase any property, shall file with the clerk of such city or town within thirty days after the passage of the final vote whereby such city or town shall have decided to establish a plant a detailed schedule describing such property and stating the terms of sale proposed. If the parties fail to agree as to what shall be sold, or what the terms of sale and delivery in accordance with the provisions of this act shall be, either party may within sixty days after the filing of the schedule apply by petition to the circuit court having juris-

diction in said county setting forth the facts and praying an adjudication between the parties, and thereafter such court shall after giving both parties an opportunity to be heard, appoint a commission or jury as now provided by law in matters of eminent domain and the exercise of the right thereof who shall give the parties an opportunity to be heard and shall thereafter determine by their award or verdict what property, real or personal, including rights and easements, shall be sold by the one and purchased by the other, in accordance with the provisions of this act and what the price, time and other conditions of the sale and delivery thereof shall be. Such commission or jury shall file their award or verdict in the office of the clerk of the circuit court having jurisdiction for revision or confirmation by said court.

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SEC. 12. Whenever the existing gas plant or electric plant of any person or corporation shall have been acquired by any city or town pursuant to the provisions of this act, the powers and rights as such person or corporation in relation to the manufacture and distribution of gas and electricity within the limits of such city or town, shall, from and after the date of such acquirement, cease and determine.

SEC. 13. All general laws of the State of Florida, and all ordinances, or by-laws of any city or town, availing itself of the provisions of this act, relative to the manufacture, use, generation or distribution of gas or electricity, or the quality thereof, or plant or appliances therefor, shall apply to such city or town so far as the same may be applicable and not inconsistent with this act, in the same manner as the same apply to persons and corporations engaged in making, generating or distributing gas or electricity therein.

SEC. 14. Nothing herein shall be construed to take away, restrict or impair any rights of any city, town or other authority which may now exist to revoke locations of wires, poles, conduits or pipes in, over or under their streets or ways: *Provided, however,* That no city or town having within its limits the main gas works, in the case of a gas plant, or the central lighting station, in the case of an electric plant, or the major portion of the wires, poles, conduits or pipes used in connection with any such works, or plants, shall except for a violation of the terms or conditions upon which

the same were granted, or for a violation of law respecting the exercise thereof, revoke any rights heretofore granted, or which may be hereafter granted to any person or corporation engaged in the business of making, generating or distributing gas or electricity for sale for lighting purposes, after the passage of the vote of the city council or town council and the vote of the electors of such city or town, as provided for in section 2 of this act.